(1)

92-2044

No. _____

Supreme Court, U.S.
FILED
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IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1992

FRANCISCO POZO-APARICIO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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FRANCISCO POZO-APARICIO

43 pp

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Attorney for Petitioner,
FRANCISCO POZO-APARICIO

QUESTIONS PRESENTED

1. Whether, in assessing application of the Federal Sentencing Guidelines, the District Court is required to hold an evidentiary hearing to resolve factual disputes in the presentence report, or, in the alternative, whether the failure to hold such an evidentiary hearing may be deemed an abuse of discretion.

2. In determining whether a defendant has accepted responsibility, on what facts may the District Court rely in determining the true facts so as to permit it to evaluate whether defendant's version of his involvement was true or false, i.e., where there has been no trial and no evidentiary hearing, there is no evidence admitted from which the District Court may conclude that Defendant's version of his involvement is untrue.

3. Is a guilty plea valid where the Indictment does not set forth the quantity of illegal drugs with which defendant is charged, and where there is no notice to defendant as to the quantity upon which the sentencing guidelines will be based?

4. May the granting of a two point reduction for acceptance of responsibility be conditioned upon defendant's self-incrimination regarding acts which are not clearly within the scope of the Indictment, i.e., does this constitute a violation of defendant's 5th Amendment rights against self-incrimination?

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT
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LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The caption of the case in this Court contains the names of all parties to the proceedings in the United States Court of Appeals for the Ninth Circuit.

PETITION FOR WRIT OF CERTIORARI

FRANCISCO POZO APARICIO, the petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on February 23, 1993, and from which a Petition for Rehearing was denied on March 19, 1993.

OPINIONS BELOW

The opinion of the Court of Appeals, whose judgment is herein sought to be reviewed is an unpublished opinion dated February 23, 1993, in United States Court of Appeals for The Ninth Circuit Case No. 91-50867, and is reprinted in the Appendix A. The prior opinion of the United States District Court for the Central District of California, Case Number CR-91-0669-HLH, entered on November 25, 1992 is unpublished, and the docket entry representing said opinion is reprinted in Appendix A to this Petition. The order denying Petitioner's Petition for Rehearing in the Ninth Circuit is reprinted in the Appendix B to this Petition.

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STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on February 23, 1993, and a Petition for Rehearing was denied on March 19, 1993. The jurisdiction of this Court is invoked pursuant to 28 USC S. 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND REGULATIONS INVOLVED

Federal Sentencing Guidelines, Section 3E1.1:

"Acceptance of Responsibility

'(a) If the defendant clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct, reduce the offense level by 2 levels.

'(b) A defendant may be given consideration under this section without regard to whether his conviction is based upon a guilty plea or a finding of guilt by the court or jury or the practical certainty of conviction at trial.

'(c) A defendant who enters a guilty plea is not entitled to a sentencing reduction under this section as a matter of right."

STATEMENT OF THE CASE

This was a criminal action brought by the United States of America against Petitioner, Francisco Pozo-Aparicio ("petitioner") for violation of 21 U.S.C. Section 841(a)(1), i.e., possession with intent to distribute cocaine. (Excerpt of Record ("ER") 6; Clerk's Record ("CR") 2).

On October 1, 1991, Petitioner pleaded guilty to the indictment before the Honorable Harry L. Hupp, United States District Court Judge (ER 9, CR 29) On November 25, 1991, Petitioner was sentenced to 151 months in the custody of the Attorney General, to be followed by a period of supervised release of five years. (ER 10; CR 41)

Petitioner appealed to the United States Court of Appeals for the Ninth Circuit asserting that the trial court had improperly failed to make certain downward adjustments under the Federal Sentencing Guidelines, and in particular under Section 3E1.1 thereof.

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At the trial level, the probation officer's report states:

> "Given the defendant's substantial denials of preknowledge and intent regarding the offense, the Probation Officer believes that the defendant has not earned a reduction for acceptance of responsibility. Because the Probation Officer was not present at the time the defendant tendered his plea of guilty, the Probation Officer respectively defers to the Court for any further determination as to how the content and time of the defendant's plea of guilty might affect the Court's ultimate determination of this issue." (emphasis added) (ER 20)

The probation report recounted Petitioner's statements that his involvement was at the instance of an old acquaintance. Petitioner stated that he was unaware of what he was transporting. The

probation officer assumed that Petitioner's version of the incidents was untrue, and therefore allocated to Petitioner a failure to admit responsibility. (ER 20-21)

However, there were no facts or evidence presented as to whether Petitioner's version of the incidents was true or false. There was no trial. If Petitioner's statements regarding how he became involved were true, when coupled with defendant's statement that **"he feels very sorry over his involvement in this situation"** would negate any facts tending to support the trial court's failure to give a reduction in sentence. (Excerpt, Page 18)

At the time of Petitioner's guilty plea, he openly admitted that he possessed the cocaine, that he was delivering it to someone else, Mr. Alvarez, and that he had the cocaine for one day under his sole control. (Excerpt, Pages 48-49)

Defendant further stated that he was pleading guilty because he was in fact guilty and not for any other reason. (Excerpt, Page 51)

As of that hearing, the trial judge stated that everything he heard indicated that there was an acceptance of responsibility. (Excerpt, Page 55)

At the sentencing hearing, Petitioner's attorney stated that there were other statements of Petitioner made to the probation officer which were not included in the report, including a statement by Petitioner that he suspected that what he was going to deliver was cocaine. (Excerpt, Page 69, lines 4-5)

The trial judge proceeding upon the assumption that the probation officer was recommending no two point reduction for acknowledgement of guilt. Yet, the probation report specifically stated that the probation officer was not present at the time of sentencing, and was therefore deferring to the trial judge for that determination. It does not appear that the trial judge took into consideration whatsoever Petitioner's plea of guilty, his statements at the time of his original guilty plea, or the facts asserted to have been improperly excluded

from the probation report.

The district court ruled that based upon the probation report, Petitioner had not admitted responsibility and therefore refused to give a two point reduction in sentencing. (ER 4, 10, CR 41)

The United States Court of Appeals for the Ninth Circuit held that whether or not a defendant accepted responsibility was a factual determination subject to the clearly erroneous standard of review, and the court utilized the probation report to support the failure to allow a two point reduction.

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REASONS FOR GRANTING THE WRIT

I

A DEFENDANT CANNOT MAKING A KNOWING AND INTELLIGENT WAIVER OF HIS RIGHTS ASSOCIATED WITH A PLEA OF GUILTY WHERE NEITHER THE INDICTMENT, THE GOVERNMENT, NOR THE COURT PROVIDES SOME FACTUAL BASIS FOR DEFENDANT TO DETERMINE HIS PROBABLE SENTENCE, I.E., BY AT LEAST SETTING FORTH THE QUANTITY OF DRUGS UPON WHICH THE SENTENCING WILL BE BASED

In the case at bar, Defendant and Petitioner contends that a criminal defendant cannot making a knowing and intelligent decision whether to forego his rights and plead guilty where neither the indictment, the government, nor the court sets forth the factual basis as to the probable sentenc

ing under the Sentencing Guidelines, i.e., by at least setting forth the quantity upon which sentencing will be based.

In United States v Morehead (10th Cir. 1992) 959 F. 2d 1489, the court held that the failure of the indictment to allege the quantity of a controlled substance did not preclude mandatory minimum sentence under the sentencing guidelines.

This holding was in direct contradiction of pre-sentencing guideline cases wherein the government was required to allege in the indictment the quantity of controlled substance in order to trigger enhanced sentencing provisions. (United States v Crockett, 812 F. 2d 626 , 629 (10th Cir. 1987); United States v Jenkins, 866 F. 2d 331, 334 (10th Cir. 1989)

In United States v Mieres-Borges, 919 F. 2d 652 (11th Cir. 1990), the court held that the government did not have to establish the weight of cocaine as charged in the indictment, and for sentencing purposes, merely had to prove the weight by a preponderance of the evidence.

In United States v Nelson, 740 F. Supp. 1502 (D. Kansas, 1990), the court held that despite the fact that the

government seized only 64 grams of cocaine base, an estimate of 500 grams could be used for sentencing purposes.

In United States v Moya, 730 F. Supp. 35 (N.D. Texas, 1990), the court held that despite the fact that defendant pleaded guilty to a charge of distributing only 22 grams of heroin, and despite the fact that Government agreed that it would be factually assumed that defendant was responsible for distributing between 1 and 2.9 kilograms of heroin, the court was free to disregard these figures and hold that the quantity was 17.7 kilograms based solely on the probation report.

Some courts have held that conduct not charged in the indictment could be considered in sentencing the defendant. (United States v Galloway, 976 F. 2d 414 (8th Cir. 1992); United States v Sklar, 920 F. 2d 107 (1st Cir. 1990)

On the other hand, in United States v Perez-Franco, 873 F. 2d 455 (1st Cir. 1989), the court held that acceptance of responsibility should be assessed solely with respect to the actual charge to which defendant pleads guilty, and not as to dismissed counts.

Defendant contends that he was denied his Fifth and

Sixth Amendment rights to have notice of the crime that he was accused of committing in view of the fact that the Indictment failed to set forth the quantity of contraband that would be utilized in sentencing the defendant. Defendant further contends that such lack of specification as to quantity rendered his plea of guilty invalid since it could not be deemed knowing and intelligent.

II

REQUIRING A DEFENDANT TO IMPLICATE HIMSELF IN CRIMES FOR WHICH HE WAS NOT CHARGED AS A CONDITION TO GRANTING A TWO POINT REDUCTION FOR ACCEPTANCE OF RESPONSIBILITY VIOLATES DEFENDANT'S FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION

In the case at bar, defendant was, in effect, penalized because he failed to admit to the probation officer that his involvement in the subject drug transaction was greater

than that to which he pled guilty. The District Court and the probation officer both assumed that Defendant's participation was much greater than that which he claimed. However, there was no trial in this action and no evidence presented whatsoever to indicate that the defendant's assertions were untrue. There was no evidence establishing that defendant's version of his involvement was untrue. The charge to which defendant pled guilty was entirely consistent with his asserted version of his involvement, and defendant contends that it was impermissible for the District Court to assume other facts to be true, when they were never proven.

Under the standard applied by the District Court, defendant would be required to admit to full involvement in the drug distribution scheme as a condition to receiving a two point reduction for acceptance of responsibility, even though there is no evidence to demonstrate that his involvement was that extensive. In effect, a defendant is required to admit to more than his actual participation, i.e., to crimes which are not necessarily charged, as a condition to receiving the two point reduction.

In United States v Herrera-Figueroa, 918 F. 2d 1430 (9th Cir. 1990), the court held that the denial of a two point reduction in offense level under the Sentencing Guidelines for acceptance of responsibility based on the refusal to speak to the probation officer did not constitute a penalty for the exercise of the Fifth Amendment right against self-incrimination. (In accord: United States v Sweeting (11th Cir. 1991) 933 F. 2d 962)

On the other hand, in United States v Frierson, 945 F. 2d 650 (3rd Cir. 1991), cert. den. 112 S. Ct. 1515, 117 L. Ed. 2d 651, the court held that the denial of a reduction in sentence for the failure of a defendant to accept responsibility constituted the type of penalty implicating Fifth Amendment privilege against self-incrimination.

In United States v. Gonzalez, 897 F. 2d 1018, 1021 (9th Cir. 1990) the court held that requiring a defendant to implicate himself in other crimes is not a violation of the 5th Amendment. (In accord: United States v Smith, 905 F. 2d 1296, 1302 (9th Cir. 1990)

In United States v Oliveras, 905 F. 2d 623 (2nd Cir. 1990), the court held that a defendant could not be denied

acceptance of responsibility reduction because he refused to make self-incriminating statements relating to counts in which he had not pled guilty and which were dismissed since defendant had no immunity for future prosecution on other counts.

On the other hand in United States v Gonzalez, 897 F. 2d 1018, 1021 (9th Cir. 1990), the court held that requiring a defendant to implicate himself in other crimes was not a violation of the Fifth Amendment because sentence reduction under the guidelines was merely a benefit. (Also see: United States v Smith, 905 F. 2d 1296, 1302 (9th Cir. 1990))

The court in United States v Perez-Franco, 873 F. 2d 455 (1st Cir. 1989) held that acceptance of responsibility should be assessed solely with respect to the actual charge to which defendant pleads guilty and not to dismissed counts.

Several courts have held that one may not look at conduct which is beyond the offense for which defendant was convicted to determine whether defendant had a primary or minor role. (United States v Tetzlaff, 896 F. 2d

1071 (7th Cir. 1990); United States v Zweber, 913 F. 2d 705 (9th Cir.. 1990) [must look at role in charged offense]).

On the other hand, other courts have held that the court may consider criminal activity beyond the charged offense to determine defendant's role. (United States v Fells, 920 F. 2d 1179 (4th Cir. 1990); United States v Villarreal, 920 F. 2d 1218 (5th Cir. 1991))

In the case at bar, no evidence was presented demonstrating defendant's actual involvement. The trial court apparently assumed, as did the probation officer, that defendant's version of his involvement (which was consistent with his guilty plea) was untrue. Unless and until evidence is presented demonstrating factually what defendant's actual involvement was, how can a trial court make a reasoned decision as to whether defendant's role is being based upon the crime with which he is charged and pled guilty to, or whether it is being based on conduct not charged (which may nor may not be true).

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III

DEFENDANT WAS DENIED DUE PROCESS BY THE FAILURE OF THE TRIAL COURT TO HOLD AN EVIDENTIARY HEARING TO DETERMINE THE CONFLICT AND DISCREPANCIES IN THE PRE-SENTENCE REPORT WHERE ALL OF DEFENDANT'S CONDUCT AND STATEMENTS IN COURT WERE CONSISTENT WITH HIS ACCEPTANCE OF RESPONSIBILI-TY, AND WHERE AN ERROR WAS LIKELY TO HAVE OCCURRED IN THE PRESENTENCE REPORT DUE TO THE FACT THAT DEFENDANT WAS SPEAKING THROUGH AN INTERPRETER

In the case at bar, Defendant and Petitioner contends that he was deprived of a constitutional right to due process by reason of the fact that no evidentiary hearing was had

respecting the accuracy of the presentence report. The presentence report resulted from statements purportedly made by defendant through an interpreter, which defendant contended were misconstrued. All of the statements of defendant at the time of the plea and at the time of sentencing were wholly consistent with his acceptance of responsibility, and the District Court appeared to rely exclusively on the vague presentence report in denying Defendant a two point reduction for acceptance of responsibility.

In United States v Wise, 976 F. 2d 393 (9th Cir. 1992), the court held that a trial court could rely on a probation officer's hearsay statements in basing its decision regarding sentencing under the sentencing guidelines, and that this procedure did not deprive defendant of due process.

On the other hand, in United States v Restrepo, 832 F. 2d 146 (11th Cir. 1987) the court held that where a defendant challenges specific factual inaccuracies in a presentence investigation report, the government's obligation to support its statements is triggered, and the government must establish its version by some proof, such as by

the testimony of the probation officer.

In United States v Anderson, 886 F. 2d 215 (8th Cir. 1989), the court held that the district court must resolve factual disputes between the presentence report and defendant's contentions. (In accord: United States v Kemper, 908 F. 2d 33 (6th Cir. 1990); United States v Sullivan, 916 F. 2d 417 (7th Cir. 1990)

In United States v Alexander, 860 F. 2d 508(2d Cir. 1988), the court stated that a criminal defendant is entitled to due process in all phases of prosecution, including sentencing, and due process requires that the defendant not be sentenced on the basis of materially false information, and defendant must be given an effective opportunity to respond to the sentencing position advanced by the government.

Courts are constitutionally required to make factual determinations underlying application of the sentencing guidelines so as not to violate due process. (United States v Wilson, 900 F. 2d 1350 (9th Cir. 1990))

On the other hand, in United States v Chambers, 715 F. Supp. 193 (E.D. Mich. 1989), the court held that a defendant was not to be permitted to recall government

witnesses at his sentencing hearing to challenge the scope of the conspiracy where such witnesses had testified at trial.

In United States v Peterman, 841 F. 2d 1474 (10th Cir. 1988), the court held that the sentencing court is not required to hold an evidentiary hearing to resolve factual discrepancies in a presentence report, and that the scope of the procedure lies within the discretion of the trial judge.

On the other hand, in United States v Kingston, 922 F.2d 1234 (6th Cir. 1990), the court held that the district court may not rely solely upon the presentence report in determining the issue of whether defendant was a minor participant. The defendant is to be given the opportunity to present evidence to prove that he was a minor participant.

In United States v Cifuentes, 863 F. 2d 1149 (3rd Cir. 1988), the court held that the trial court record must be clear as to whether the judge was relying upon disputed information in the presentence report.

A defendant's guilty plea must be both knowing and voluntary in order to be valid, and the defendant's decision to plead must constitute a deliberate, intelligent choice between available alternatives. (Rosado v Ciuiletti, 621 F.

2d 1178, 1191, cert den. 449 U.S. 856 (1980))

In Rodriguera v United States, 954 F. 2d 1465 (9th Cir. 1992) the court held that a district court's failure to advise a defendant of mandatory supervised release term at time defendant entered his guilty plea affected his substantial rights and required that defendant be provided with opportunity to replead. The court failed to advise defendant that defendant's liberty could be restricted beyond the 40 years sentence.

In United States v Ramos, 923 F. 2d 1346 (9th Cir. 1991) the court held that the district court was not required to advise defendant of the applicability of the Sentencing Guidelines.

In United States v Alvarez-Quiroga, 901 F. 2d 1433 (7th Cir. 1990), cert. den. 111 S. Ct. 203, 112 L. Ed 2d 164, the court held that a plea of guilty does not require the district court to predict applicable sentencing range under Sentencing Guidelines for defendants who are entering guilty pleas.

On the other hand, in United States v Apfel, 945 F. 2d 236 (8th Cir. 1991) the court held that the government

should give notice to the defendant by setting forth during the plea proceedings sentence enhancements that it intends to seek, such as the amount of drugs involved and use of a gun.

Likewise, in United States v Pimentel, 932 F. 2d 1029 (2d Cir. 1991) the court held that district courts should explain to defendants before accepting pleas what sentence is likely to be imposed, and it is preferred practice for government attorneys to inform defendants as to the likely range of sentences that the plea will authorize under the Sentencing Guidelines.

On the other hand, in United States v De Fusco, 930 F. 2d 413 (5th Cir. 1991) reh. den 933 F. 2d 1006, cert. den. 112 S. Ct. 239, 116 L. Ed. 2d 194, the court held that the trial court was not required to inform the defendant of the sentencing range under the Sentencing Guidelines.

In United States v Ramos, 923 F. 2d 1346 (9th Cir. 1990) the court held that a district court was not obliged to advise the defendant of the applicability of sentencing guidelines or ineligibility for parole.

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The court in United States v Carlisle, 907 F. 2d 94 (9th Cir. 1990) held that the district court must articulate its findings of fact under the sentencing guidelines.

In United States v Gines, 964 F. 2d 972 (10th Cir. 1992), the court held that a district court did not abuse its discretion in refusing to hold an evidentiary hearing regarding claimed inaccuracies in a presentence report.

In United States v Morrison, 946 F. 2d 484 (7th Cir. 1991), the court held that the district court must establish drug quantity with sufficient certainty to justify application of sentencing guidelines, i.e., the district court must state how the quantity was determined, but may consider all drugs tied to a common conspiracy.

In addition to the discrepancy between the presentence report and the facts as asserted by defendant, i.e., errors in the report itself, there is a further problem with the District Court's failure to provide an evidentiary hearing. As noted above, the probation officer and the District Court both assumed that defendant's involvement was greater than that which , according to the presentence report, defendant admitted to the probation officer. However, on what basis

did the trial court and the probation officer make the assumption that defendant's involvement was in fact greater than that which he purportedly stated to the probation officer? There was no trial in this case. Defendant's actual involvement was never in fact proven. Defendant's purported version of his involvement was consistent with his guilty plea.

As noted above, the District Court is required to make factual findings. Defendant contends that a court may not make a factual finding as to whether a defendant has accepted responsibility unless and until evidence is presented demonstrating defendant's true involvement in the underlying criminal offense. In the absence of such evidence, the veracity of statements made by a defendant setting forth his involvement cannot be tested. There is no measure by which to test whether defendant's statements are in fact truthful, i.e., thereby evidencing a full acceptance of responsibility based on his actual conduct, or whether they are false.

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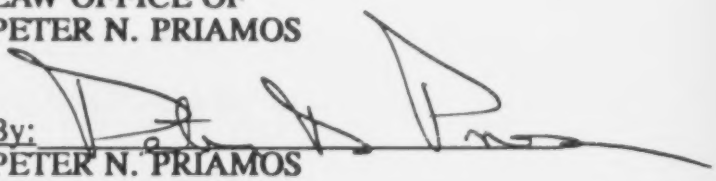
CONCLUSION

WHEREFORE, petitioner respectfully prays that a writ of certiorari be granted.

DATED: June 21, 1993

LAW OFFICE OF
PETER N. PRIAMOS



By:
PETER N. PRIAMOS
Attorney for Petitioner

APPENDIX A

OPINIONS BELOW

ORDER OF DISTRICT COURT

CT: 1 DFT IS COM TO THE CUST OF THE B/P TO BE IMPRISONED FOR 151 MOS. UPON REAL FRM IMPRISONMENT, DEFT SHALL BE PLCD ON SUP REL FOR 5 YRS UNDER THE FOLLOWING TERMS & CONDS IN THAT DFT SHALL: 10 COMPLY W./TH R & R OF TH USPO & GO 318, 20 COMPLY W/THE R & R OF THE INS, & IF DEPORTED FRM THIS COUNTRY, EITHER VOLUNTARILY OR INVOLUNTARILY, NOT REENTER TO THE US DURING THE PERIOD OF CRT-ORD SUPERVISION, DFT SHALL RPT TO THE NEAREST USPO W/IN 72 HRS, PUR TO SEC 5E1.2(F) OF THE GUIDELINES, ALL FINES ARE WAIVED, INCLDING THE COSTS OF IMPRISONMENT & SUPERVISION, AS IT IS FOUND THAT DFT DOES NOT HAVE THE ABILITY TO PAY, S/A $50, THE CRT FUR INFORMS DFT OF HIS RIGHT TO APPEAL W/IN 10 DAYS, THE CRT FUR RECOM-MENDS THAT DFT BE HOUSED @ A CALIF INSTI W/FAMILY VISITATION RIGHTS. L. KODZEFF-EW

(11/24/91)

ORDER OF NINTH CIRCUIT COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	) No.91-50867
	) D.C. No.
Plaintiff-Appellee,	) CR-91--669-HLH
	)
v.	) ORDER
	)
FRANCISCO POZO-APARICIO aka FRANCISCO POZO APARICIO,	)
	)
Defendant-Appellant.	)

APPEAL FROM the United States District Court for the Central District of California, Los Angeles.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California, Los Angeles and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the

said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered 2/23/93.

OPINION OF THE NINTH CIRCUIT

COURT OF APPEALS

NOT FOR PUBLICATION

[Filed Feb 23 1993]

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	) No.91-50867
	) D.C. No.
Plaintiff-Appellee,	) CR-91--669-HLH
	)
v.	) MEMORANDUM*
	)
FRANCISCO POZO-APARICIO aka FRANCISCO POZO APARICIO,	)
	)
Defendant-Appellant.	)

Appeal from the United States District Court
for the Central District of California
Harry L. Hupp, District Judge, Presiding

Submitted February 1, 1993**
Pasadena, California

Before: BEEZER, BRUNETTI and THOMPSON, Circuit Judges.

Francisco Pozo-Aparicio pleaded guilty to one count of possession of cocaine with intent to distribute in violation of 11 U.S.C. S 841(a)(1) (1988). He had delivered 34.5

kilograms of cocaine to an undercover agent. The district court imposed a 151-month sentence. Pozo-Aparicio Appeals his sentence. He contends he was entitled to downward adjustments in his sentence for acceptance of responsibility and for minor or minimal participation in the offense. We have jurisdiction under 28 U.S.C. S 1291 and 18 U.S.C. S 3742, and we affirm.

ACCEPTANCE OF RESPONSIBILITY

Pozo-Aparicio contends he is entitled to a downward adjustment for acceptance of responsibility under U.S.S.G S 3E1.1. In support of this contention, he points to his prompt guilty plea and his statement tot he court admitting he knew he delivered cocaine to the undercover agent.

Pozo-Aparicio subsequently told the probation officer, however, that he had delivered the suitcase an box without knowledge that they contained cocaine. He added he was to be paid $2,000 by a friend he had just seen for the first time in eleven years. The district court determined these statements reflected a lack of acceptance of responsibility, and refused to grant a downward adjustment in the offense level.

"'Whether or not a defendant has accepted responsibility for his crime is a factual determination' subject to the clearly erroneous standard of review." United States v Sanchez, 908 F. 2d 1443, 1450 (9th Cir. 1990)). The probation officer quotes Pozo=Aparicio as saying he "never imaged"that he was to deliver narcotics. Presentence report at 4. The district court did not commit clear error in finding that Pozo-Aparicio had not accepted responsibility for his crime.

MINOR OR MINIMAL PARTICIPANT

Pozo-Aparicio contends he had a minimal role in the cocaine transaction compared to an individual called "the doctor," who was the organizer. The district court determined that Pozo-Aparicio's participation was neither minor nor minimal under U.S.S.G. S 3B1.2.

"We review a trial court's determination that a defendant is not a minor or minimal participant for clear error.": United States v Torres-Rodriguez, 930 F. 2d 1375, 1389 (9th Cir. 1991). "The defendant must prove his status as a minor participant by a preponderance of the evidence." Sanchez, 908 F. 2d at 1449.

The district court determined that Pozo-Aparicio had

full control of 34.5 kilograms of cocaine, arranged the time for delivery, and made the delivery. These facts indicated a degree of trust in Pozo-Aparicio which belied his claim of a minor role. Pozo-Aparicio's statements to the probation officer regarding his role in the offense do not undermine these findings. The court's denial of a downward adjustment for minor or minimal participant status was not clearly erroneous.

AFFIRMED.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

**The panel unanimously finds this case suitable for disposition without oral argument. Fed R. App. P. 34(a); 9th Cir. Rule 34-4

APPENDIX B

ORDER ON REHEARING

[filed Mar 19, 1993]

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	) No.91-50867
	) D.C. No.
Plaintiff-Appellee,	) CR-91--669-HLH
	)
v.	) ORDER
	)
FRANCISCO POZO-APARICIO aka FRANCISCO POZO APARICIO,	)
	)
Defendant-Appellant.	)

Before: BEEZER, BRUNETT and THOMPSON, Circuit Judges.

The petition for rehearing is DENIED.